

# **EVOLUTION & GROWTH OF JUDICIAL ACTIVISM** **IN INDIA**

## **3.1 INTRODUCTION**

It is very difficult to trace the origin of judicial activism in India. Since the judiciary has come to be recognized as an independent and separate organ of the Government under the Government of India Act, 1935 and subsequently under the Constitution of India, it would be prudent to scan the period subsequent to 1935 for tracing the origin. However, there are a few instances even prior to that period, where certain selected judges of High Courts established under the Indian High Courts Act, 1861 exhibited certain flashes of judicial activism. Way back in 1893, Justice Mahmood of the Allahabad High Court delivered a dissenting judgment which sowed the seed for judicial activism in India. In that case which dealt with an under trial who could not afford to engage a lawyer, Justice Mahmood held that the pre-condition of the case being “heard” would be fulfilled only when somebody speaks.<sup>139</sup>

The concept of judicial activism can be seen to be reflecting from the trends exemplified by some decisions and orders of the Supreme Court. They are as under:

1. The judiciary since 1973 claims the power to nullify on substantive grounds; even an amendment made to the constitution by the amending body if it changes “the basic structure or framework of the Constitution”. This concept of judicial control over the constitution has been evolved by and known to courts in India only.<sup>140</sup>
2. The undoubted privileges of the Legislature even in respect of their internal proceedings have been brought under the purview of judicial review.<sup>141</sup>
3. Power of Judicial review as exercised by the Supreme Court and the High Courts has been recognized by those courts to be an unalterable “basic structure of the Constitution”.<sup>142</sup>

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<sup>139</sup> Balkrishna, Ref. to the Article, When seed for Judicial Activism was sowed, “*The Hindustan Times*” (New Delhi ) dated 01-04-96, p.9.

<sup>140</sup> Since *Keshavanad Bharti v. State of Kerala* AIR 1973 SC 1463.

<sup>141</sup> In *re Keshav Singh* AIR 1965 SC 745.

4. Eighteen High Courts, with the Supreme Court at the apex, correct the entire gamut of the country's administration.
5. The concept of 'state' for the purpose of enforcement of fundamental rights has been widened by successive judgments of the Supreme Court so as to include all public, quasi-public authorities.
6. The courts have broadened the scope of "Locus Standi" in the Public Interest Litigation matters, in the early eighties.
7. The Supreme Court has often resorted to judicial legislation by virtue of its powers under Article 141 to fill the void created by the so-called legislative vacuum.<sup>143</sup>

A thorough analysis of the above list of examples of judicial assertiveness (behaviour) makes it amply clear that it would be very difficult to trace the origin of judicial activism in Independent India. A perusal of the catena of decisions rendered by the Indian judiciary after 1950 especially by the Supreme Court compels any researcher to believe that there have been flashes of judicial activism before the 1980's. However, there has been no uniformity in all the areas and jurisdictions of the Supreme Court, in exercise of a greater judicial power. The amount of activism varied in different areas like interpreting the constitution, guarding the fundamental rights of the citizens, expansion of scope of "Locus Standi" in Public Interest Litigation, Omni presence of judicial review, expansion of horizons of Article 21, and construction of certain directive principles as fundamental rights, and so on.

Thus, it would be necessary to discuss the activist tendencies of the Supreme Court before the eighties in short and after the eighties in greater detail. But, before embarking on such a dichotomous discussion, it would be quite essential to analyze and discuss the definition of judicial activism, reasons for judicial activism, the frame work, and different dimensions of judicial activism and more importantly the Indian perspectives of judicial activism.

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<sup>142</sup> *In Indira Nehru Gandhi v. Raj Narain*, (1975) SCC Supp. 1, *Kihota Hollohon v. Zachillu L.* (AIR 1993 SC 412) *Chandra Kumar v. Union of India* (1997, SC) AIR 1997 SC 1125.

<sup>143</sup> *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

### **3.2 MEANING OF “JUDICIAL ACTIVISM”**

At the outset, it has to be stated that there is no precise definition of judicial activism accepted by one and all. However, there is a widely accepted notion that it is related to problems and processes of political development of a country. In other words, judicial activism deals with the political role played by the judiciary, like the other two branches of the State viz, the legislature and the executive.

An eminent Indian jurist defines judicial activism in the following words:

(Judicial) Activism is that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes.”<sup>144</sup>

The same authority goes on to add that judicial activism is the use of judicial power to articulate and enforce counter-ideologies which when effective initiates significant re-codifications of power relations within the institutions of governance. An analysis of the above attempt by Upendra Baxi to define judicial activism shows that activism of the judiciary pertains to the political role played by it, like the other two political branches. The justification for the judicial activism comes from the near collapse of responsible government and the pressures on the judiciary to step in aid which forced the judiciary to respond and to make political or policy-making judgments.<sup>145</sup>

“Judicial Activism” and ‘judicial restraint’ are the terms used to describe the assertiveness of judicial power. The user of these terms presumes to locate the relative assertiveness of particular courts or individual judges between two theoretical extremes. The extreme model of judicial activism is of a court so intrusive and ubiquitous that it virtually dominates the institutions of government. The Encyclopedia of the American Constitution<sup>146</sup> states that the uses of ‘Judicial restraint’ are not entirely uniform. Often the terms are employed non-committally i.e., merely as descriptive short hand to identify some court or judges as more activist or more

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<sup>144</sup> Upendra Baxi, *Courage Craft and Contention -The Indian Supreme Court in the Eighties* (Bombay : 1985) P.10

<sup>145</sup> This view is *advocated* by T.R.Adhyarujina in his book titled “*Judicial Activism and Constitutional Democracy in India* (Bombay, 1992) at p.9.

<sup>146</sup> Vol 3, (New York London, 1986) P. 1032.

restrained than others. In this sense, the usage is neither commendatory nor condemnatory.

These expressions viz., judicial activism and judicial restraint are used from the angle of the personal or professional view of the “right role” of the Court. Accordingly, the courts may be condemned or commended for straying from or for conforming to that “right role”. In U.S.A., in more than two centuries of judicial review, superintended by more than one hundred justices who have served on the Supreme Court and who have interpreted a constitution highly ambiguous, in much of its text, consistency has not been institutional but personal. Individual judges have maintained strongly diverse notions of the “proper” or “right” judicial role.

In U.S. the concept of judicial activism has often been used as synonymous with “Judicial absolutism” “judicial supremacy”, “judicial anarchy” and “judicial imperialism”. Always judicial activism has been used as an antonym of “judicial restraint”, also popularly known as judicial conservatism.

According to Americans activism means the propensity of federal judges mainly but not always on the Supreme Court, to intervene in the governing process as to substitute their judgment for that of federal and state political officers.<sup>147</sup>

Activism is considered to be an ascriptive term.<sup>148</sup> Generally, judges are evaluated as activists by various social groups in terms of their interests, ideologies and values. As Baxi explained in his erudite style, to answer a question as to who is an “activist” judge is rather difficult, since the labels “activist” and its opposite the “restraintivist”, are used by those who specialize in judging the judges. There appears to be at least five identifiable groups of people who judge the judges.

First, the scientific judges of judge’s viz., those including law teachers, social scientists and investigative journalists.

Second, the “managerial” judges of judges which group includes the top echelons of bureaucracy and the supreme executive (Prime Minister), for the management of acts like appointment and transfer of judges etc.

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<sup>147</sup> Arthur Selwyn Miller, *Toward Increased Judicial Activism: The Political role of the Supreme Court* (West Court: Conn 1982), p 6.

<sup>148</sup> *Supra note*. 143.

Third, the lawyers some of whom feel that it is their professional duty to judge the judges and some others who felt that it is their exclusive right to do so.

Fourth, the so-called “victims” of use of judicial power, who include police, prison officials, custodial officials, administrative authorities, corporations, universities and landlords etc. and

Fifth, the “beneficiaries” of use of judicial power eg. Civil services, students, trade unions, pensioners, prisoners, labour, and taxpayers, etc.

These various groups differ in their conceptions of “activism”. Thus, when one group considers an action of the judiciary to be active, the same may be considered as inactive by the other groups. It is humanly impossible for any court or judge to satisfy all the groups mentioned above, simultaneously and this is the precise reason as to why there cannot be any uniformity of judicial activism. The main reason for this unavoidable conclusion is the fact that there are many competing rights and conflicting interests of various sections of the society, which become the subject matter of judicial scrutiny every time.

The foregoing discussion makes it clear that the expression, “judicial activism” has eluded a definition as an abstract concept. It is incapable of formulation by definition only. It means different things to different people. Some admit that it means the dynamism of judges, some other people consider it a judicial creativity and some other people might consider it as judicial ‘social or cultural’ revolution through the judiciary. However, the use of revolution to describe a judicial function appears to be improper.

### **3.3 VARIOUS THEORIES OF CONCEPT OF JUDICIAL ACTIVISM**

As far as the origin and evolution of judicial activism go, there are two theories behind the whole concept. They are: (i) Theory of vacuum filling and (ii) Theory of Social Want.

#### **3.3.1 THEORY OF VACUUM FILLING**

The theory of vacuum filling states that a power vacuum is created in the governance system due to the inaction and laziness of any one organ. When such a

vacuum is formed, it is against the good being of the nation and may cause disaster to the democratic set up of the country. Hence, nature does not permit this vacuum to continue and other organs of governance expand their horizons and take up this vacuum. In this case, the vacuum is created by the inactivity, incompetence, disregard of law, negligence, corruption, utter indiscipline and lack of character among the two organs of governance viz. the legislature and the executive.<sup>149</sup> Hence the remaining organ of the governance system i.e. the judiciary is left with no other alternative but to expand its horizons and fill up; the vacuums created by the executive and the legislature. Thus according to this theory, the so-called hyper-activism of the judiciary is a result of filling up of the vacuum or the void created by the non-activism of the legislature and the executive.

### **3.3.2 THEORY OF SOCIAL WANT**

The Theory of Social Want states that judicial activism emerged due to the failure of the existing legislations to cope up with existing situations and problems in the country. When the existing legislations failed to provide any pathway, it became incumbent upon the judiciary to take on itself the problems of the oppressed and to find a way to solve them. The only way left to them within the framework of governance to achieve this end was to provide non-conventional interpretations to the existing legislations, so as to apply them for greater good. Hence, the judicial activism has emerged. The supporters of this theory opine that “judicial activism plays a vital role in bringing in the societal transformation. It is the judicial wing of the state that injects life into law and supplies the missing links in the legislation. Having been armed with the power of review, the judiciary comes to acquire the status of a catalyst on change.”<sup>150</sup>

### **3.4 ORIGIN OF THE CONCEPT OF JUDICIAL ACTIVISM**

The concept of judicial activism found its roots in the English concepts of ‘equity’ and ‘natural rights’. On the American soil, these concepts found expression in the concept of ‘judicial review’. The first landmark case in this regard was the case of

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<sup>149</sup> S.C.Kashyap, *Judiciary-Legislature Interface* (Universal Publishing House, New Delhi, 1997), p.71.

<sup>150</sup> Shailja Chander, *Justice V.R.Krishna Iyer on Fundamental Rights and Directive Principles*, (Deep and Deep Publications, New Delhi. 1998), p.223.

*Marbury v. Madison*<sup>151</sup>. In this case, for the first; time the judiciary took an active step and took a step above the legislative actions. Marbury was appointed Judge under the Judiciary Act of 1789 by the U.S.Federal Government. Though the warrant of appointment was signed, it could not be delivered. Marbury brought an action for issue of a writ of mandamus. By then, Marshall became the Chief Justice of the Supreme Court having been appointed by the outgoing President, who lost the election. Justice Marshall faced the imminent prospect of the Government not obeying the judicial fiat if the claim of Marbury was to be upheld. In a rare display of judicial statesmanship asserting the power of the Court to review the actions of the Congress and the Executive, Chief Justice Marshall declined the relief on the ground that Section 13 of the Judiciary Act of 1789, which was the foundation for the claim made by Marbury, was unconstitutional since it conferred in violation of the American Constitution, original jurisdiction on the Supreme Court to issue writs of mandamus. He observed that the Constitution of the United States confirms and strengthens the principle supposed to be essential to all written Constitutions. That a law repugnant to the Constitution is void and that the courts as well as other departments are bound by that instrument. If there was conflict between a law made by the Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law. This judgment received lots of criticisms from different quarters, but judicial review was here, and it was here to stay.

In the initial stages, only in respect of substantive laws, the doctrine of due process was applied but later the procedural laws also were brought within its purview. Between 1898 and 1937, the American Supreme Court declared 50 Congressional enactments and 400 State laws as unconstitutional. With the power of judicial review up in its sleeves, the American judiciary started the modern concept of judicial activism in 1954 with the landmark judgment in *Brown v. Board of Education*<sup>152</sup>. Starting from this judgment and by a series of judgments after this, the Supreme Court of America ruled out all the laws which segregated the Negroes from all the fields of day to day life. The earlier position taken in *Plessy v. Ferguson*<sup>153</sup> that blacks could be treated as a separate class but must be provided with equal facilities – separate but equal-founded on racial discrimination was rejected by the Supreme Court at the risk of

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<sup>151</sup> *Marbury v. Madison* 5 U.S (1 Cranch) 137 (1803).

<sup>152</sup> *Brown v. Board of Education* 347 U.S. 483 (1954).

<sup>153</sup> *Plessy v. Ferguson* 163 U.S. 537 (1896).

disturbing the institutional committee and delicate balance between the three organs of the State. Not only did the Court abolish the laws which did not ascribe to the prescribed Constitutional norms, but also encompassed more rights which were not clearly provided for in the Constitution.

### **3.5 REASONS FOR THE RISE AND GROWTH OF JUDICIAL ACTIVISM**

It is very difficult to state precise reasons for the emergence of judicial activism under any constitution. Further there cannot be any universal acceptance of these reasons to be correct, in view of the conflicting interest and ideologies of various groups of the society concerned with judicial activism in particular, and judicial power in general. The following are some of the well accepted reasons which compel a court or a judge to be active while discharging the judicial functions assigned to them either by a constitution or any other organic law.

- (i) **Near collapse of responsible government:** - When the two political branches of the Government viz. the Legislature and the Executive fail to discharge their respective functions, there will be a near collapse of responsible government. Since a responsible government is the hallmark of a successful democracy and constitutionalism, its collapse warrants many a drastic and unconventional steps. When the Legislature fails to make the necessary legislation to suit the changing times and when the governmental agencies fail miserably to perform their administrative functions sincerely and with integrity, it would lead to erosion in confidence in the constitution and democracy among the citizens. In such an extraordinary scenario the judiciary may legitimately step into the areas usually earmarked for the legislature and executive. The result is the judicial legislation and government by judiciary.
- (ii) **Pressure on judiciary to step in aid:** - Now, it has become fully established that the judiciary cannot remain a silent spectator when the fundamental or other rights of the citizens are trampled by the government or third parties. The judges, as responsible members of the society do feel that they have a role to play in ameliorating the



worsening conditions of the citizens. As Upendra Baxi has rightly highlighted, the Indian nation is obsessed with judicial salvation.<sup>154</sup> It has become natural for the citizens to look up to the judiciary to step in their aid and to protect their fundamental rights and freedoms. This mounts tremendous pressure on the judiciary on the whole to do something for the suffering masses. It may lead to an activist role being taken up by the judiciary.

- (iv) **Judicial enthusiasm to participate in social reform and change:** - As has been already pointed out, the judges cannot be idle and silent spectators when the times go on changing. As the persons involved in interpreting and applying a law which is not static but dynamic, the judges would like to participate in the social reforms and changes that take place due to the changing times. Under such circumstances, the judiciary has itself claimed to be an active participant in social reformatory changes. It has encouraged and at times initiated Public Interest Litigation (PIL), also known as Social Action Litigation (SAL) in India. In such cases, the courts have discarded the traditional constraints on themselves such as the requirements of standing, ripeness of the case and adversarial forms of litigation and have assumed the functions of an investigator, counselor, and monitor of administration.

This liberalized approach of the judiciary would lead to relaxation of certain procedural and customary rules for invoking a court's jurisdiction which can be directly related to the expansion of judicial power. So when courts themselves initiate corrective actions for social ills, their activity becomes indistinguishable from that of the commissioners of grievances.

- (v) **Legislative vacuum left open:** - In Administrative Law, there is a saying that even if the parliament and all the State Legislatures in

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<sup>154</sup> Upendra Baxi, Supra note 143....10.

India made laws for 24 hours a day and 365 days in a year, the quantum of law cannot be sufficient to the changing needs of the modern society.<sup>155</sup> The same thing holds well in respect of many a legislation passed by the competent legislature. In spite of the existence of a large quantum of pre and post-constitutional laws, there may still be certain areas, which have not been legislated upon. This may be due to inadvertence, lack of exposure to the issues, the absence of legislation or indifference of the legislature. Thus, when a competent legislature fails to act legislatively and enact a necessary law to meet the societal needs, the courts often indulge in judicial legislation. In this context, judicial legislation has to be understood as an incident to statutory interpretation. The courts often have acted to fill the void created by the legislature's abdication of legislative responsibility.<sup>156</sup>

- (vi) **The Constitutional scheme:** - The Indian Constitution contains number of provisions, which give the judiciary enough scope to assert itself and play an active role. Under Article 13, the judiciary is implicitly empowered to review the validity of any law on the touchstone of Fundamental Rights and to declare the same as void if it contravenes any of the Fundamental Rights. Under Art.19, the Court has power to decide whether the restrictions on Fundamental Rights are "reasonable" or not. Under Article 32, any person whose Fundamental Rights is violated can straightaway approach the Supreme Court for the enforcement of those fundamental rights. Further the right to approach the Supreme Court under Article 32 itself has been made a fundamental right under the caption 'right to constitutional remedies'. Thus the Supreme Court has been designated as the guardian of the fundamental rights of the citizens and while playing that role, the Supreme Court often indulges in legitimate judicial legislation and judicial government.

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<sup>155</sup> I.P.Massey, *Administrative Law* (Eastern Book Company, Calcutta).

<sup>156</sup> As happened in *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

Under Article 131 of the Constitution, the Supreme Court has been vested with jurisdiction to uphold the federal principle of the Constitution. The Supreme Court is the highest Appellate Court and it exercises this appellate jurisdiction in all Civil, Criminal and Constitutional matters.<sup>157</sup> The Supreme Court has been vested with advisory jurisdiction to advise the President on any question of fact or law that may be referred to it.<sup>158</sup> The Supreme Court has rule making power under Articles 142 and 145. It has the power to punish any person for its contempt under Article 129. This list is only illustrative and not exhaustive. A detailed discussion has been made elsewhere in this thesis.

A cumulative analysis of all the above provisions makes it abundantly clear that the judiciary in India, in general and the Supreme Court in particular, has vast powers under the Constitution and has enough scope for being active, and to uphold the cardinal principle of Constitutionalism.

- (vii) **Authority to make final declaration as to validity of law:** - The Supreme Court of India is the final arbiter and umpire as to the validity of law. Under Article 141, the Supreme Court has the power to declare any law and the said declaration has the force of an authoritative precedent, binding on all other courts in India, of course except the Supreme Court itself. While adjudicating on the issue of any legal aspect, even though it has to be remembered by the Supreme Court that “(Supreme Court judgments) are not final because (they).....are infallible, but (they) .....because (they) are final.”<sup>159</sup> It may well be possible that the court also may overlook this principle.

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<sup>157</sup> Under Articles 132 to 137 of the Constitution of the India.

<sup>158</sup> Under Article 143 of the Constitution of India.

<sup>159</sup> As remarked by Justice Jackson of the U.S. Supreme Court in *Brown v. Allen* 344 US 443-540 (1944).

In *Indira Sawhney v. Union of India*,<sup>160</sup> a 3-Judges Bench of the Supreme Court encountered a peculiar and belligerent situation where one of its directions in the Mandal Commission Judgment<sup>161</sup> to the States to identify the advanced section among the Backward Classes of Citizens that is creamy layer for the purpose of excluding them from availing the benefits of reservation etc. In the instant case the Kerala State Backward Classes (Reservation of Appointments/Posts in Services) Act, 1995 gave retrospective effect that “no creamy layer” exists in State of Kerala was found unconstitutional by the court which took serious note of the action of Kerala Government and initiated contempt proceedings against the State.

The final authority of the Supreme Court is deciding the validity of law, and it gives the court a great discretionary power without any accountability whatsoever and a consequent development is characterized as the judicial activism.

- (viii) **Role of judiciary as guardian of Fundamental Rights:** - The fundamental law of the land i.e. the Constitution of India, 1950 has designated the higher judiciary in India as the guardian of the fundamental rights of the citizens.

A cumulative reading of Articles 13, 32 and 226 makes it very clear that the higher judiciary in India has been endowed with the onerous task of upholding the fundamental rights of the citizens. Under Article 13 of the Constitution any law which abridges fundamental rights shall be declared as void by the Supreme Court and the 18 High Courts. Under Article 32 of the Constitution, the Supreme Court has the power to issue any writ, order or direction to any person or authority violating the fundamental rights of citizens. In fact the right to approach the Supreme Court itself has

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<sup>160</sup> AIR 2000 SC 498.

<sup>161</sup> AIR 1993 SC 477.

been made a fundamental right on its own under Articles 32 to 35. Under Article 226 of the Constitution, the High Courts enjoy a power which is even more widely, to enforce the fundamental or other rights of the citizens, by invoking the writ jurisdiction of the High Court. All these powers vested in the Constitutional Courts, enable them to exercise vast powers of judicial review in respect of any legislative, quasi-legislative, executive, quasi-judicial or other actions of the State and its agencies. In fact this is the role which has been played by the Supreme Court and the High /courts effectively. The result often is the brooding omnipresence of judicial activism.

- (ix) **Public confidence in the judiciary:** - The greatest asset and the strongest weapon in the armoury of the judiciary is the confidence it commands and the faith it inspires in the minds of the people in its capacity to do even handed justice and keep the scales in balance in any dispute.<sup>162</sup> A recent study made by two law professors on the role of the Supreme Court of India reveals that 85% of the law students of Delhi University declared that they trust the Court rather than the Parliament.<sup>163</sup> Majority of the students liked the Public Interest Litigation and Judicial Activism of the Supreme Court. The study shows that there is an extraordinary high level of support for the institutions. Probably in no other country has any segment of the elite public ever demonstrated such overwhelming general esteem for a flagship constitutional court, or for any other major institution. This clearly shows the public confidence and trust reposed by the people of India in the Supreme Court as the ultimate guardian of their rights and liberties. The Supreme Court has withstood the test of times through the device of Judicial Activism.

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<sup>162</sup> H.R.Khanna, *Judiciary in India and Judicial Process* (1985) 47.

<sup>163</sup> George H. Gadbois, Jr. and Mool Chand Sharma: "Law Student Evaluate the Supreme Court – A case of Enchantment", *Journal of the Indian Law Institute* Vol.31: No.1 1989, pp 1-46.

- (x) **Enthusiasm of individual players:-** As rightly pointed out by Professor Upendra Baxi, many individual players are responsible for activating judicial activism,<sup>164</sup> They are civil right activists, people right activists, consumer right groups, bonded labour groups, citizens for environmental action, women rights groups and assorted lawyer – based groups etc. , it may be noted here that this list is only illustrative. The same jurist goes on to point out that although judicial activism is a collective venture, some individual justices have also played a foundational role. For instance without Krishna Iyer, P.N. Bhagwathi, O. Chinappa Reddy and D.A. Desai, JJ, in the formative years of social action litigation, there would not have come into existence the activist judicial being, signified by social action litigation.

The judicial actors have been classified by Prof. Baxi, into the following categories. (1) Inaugural Judicial Actors who laid the foundation of judicial activism such as Desai, and Chinnappa Reddy, JJ who were quick to extend the realm of judicial activism to the protection of the rights of organized labour. Similarly subsequent news judicial actors like Justice Kuldip Singh in the case of Environmental Jurisprudence, Justice K. Rama Swamy in the area of the rights of depressed class and Justice J.S. Verma in the area of Corruption in High Places also made significant contribution for judicial activism in India (2) Restoratives Judicial Actors such as Justice R.S. Pataki and Justice Venkat Ramaiah (3) Eclectic Judicial Actors who neither find out nor hostile to judicial activism (4) Gatekeeper Judicial Actors (5) Anti Activism Judicial Actors and (6) Revisionist Judicial Actors. Prof. Baxi, considers another category of superannuated judicial actors who primarily consist of retired judges who with their long and active life in the service of the nation, occupy visible role in national bodies such as Law Commission of India, the Human Right Commission, the Minorities Commission and the Press Council of India. These visible and power to individuals perform the role of conscience-keepers of their latter-day success. If one name has to

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<sup>164</sup> In his Article “The Avatars of Indian Judicial Activism : Explorations in the Geographies of [in] Justice” in S.K.Verma and Kusum (Ed.); *Fifty years of the Supreme Court of India – Its Grasp and Reach*, Indian Law Institute ( Oxford University Press New Delhi, 2000) p. 173.

be mentioned as the embodiment of these roles and processes, Justice V.R. Krishna Iyer furnishes a shining example of activist superannuated judicial actor. In the words of Baxi, “his impact off the Bench is even more enduring on the life of law in India than during the few years of his explosive activist presence and performance in the Supreme Court of India.

It may be admitted that the above reasons are not the only reasons, which prompt; the judiciary to be active. However, these are the primary reasons that compel the judiciary to be active or conservative at a given point of time, depending on the prevailing circumstances in the society, government and the world at large.

### **3.6 A FRAME WORK FOR THE ANALYSIS OF JUDICIAL ACTIVISM**

The frame work of judicial activism in U.S.A. and India varies to a large content. A discussion on the American perspectives is imperative to understand the distinction. In America, there are almost as many conceptions of judicial activism as there are commentators. Some discuss activism almost solely in terms of the court’s nullifying Acts of congress.<sup>165</sup> Some see activism largely in the Court’s violation of its obligation of comity to the other branches of government or to the States<sup>166</sup> [Alexander M. Bickel], *the Least Dangerous Branch: The Supreme Court at the Bar of politics* (Indiana polis: Bobbs-Merril, 1962]. Some contend that activism occurs when the court abandons “neutral principles” in deciding cases.<sup>167</sup>

In India, after the initial hesitation and with some aberration, the present activist approach of the Highest Bench has now provided a philosophy that can meet the inadequacies of the traditional judicial role, its perception and performance. This behavioural change has attracted the attention of the legislature, executive and the people to many neglected facets of judicial process. New conceptions are being developed wherein the impact of judicial decisions well beyond the courtroom is being increasingly realized.

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<sup>165</sup> For Example, Robert A-Jackson, *The struggle for Judicial Supremacy : A study of crisis in American power politics* (New York : knopf) 1941; Learned hand, *The Bill of Rights* (Cambridge : Harvard University Press, 1958)

<sup>166</sup> For example, Wallace Mendelson, *The Supreme Court: Law and Discretion* (Indian polis: Bobbs-Meril, 1967).

<sup>167</sup> Herbert Wechsler, “Toward Neutral principles of Constitutional Law”, *Harvard Law Review* 73 (November, 1959): 1-35; and Louis Henkin, “Some Reflections on current Constitutional controversies,” *University of Pennsylvania Law Review* 109 (March 1961): 637-662.

The societal context of the judiciary is now readily apparent and the society has become increasingly interested in the contributions of the judiciary to the development of a social philosophy rather than in the decision for its own sake. Any judicial process is not an end in itself. It is a part of the entire socio-political system. Gone are the days when; it was considered that the judiciary is the weakest organ of the government. Its power of thought and pen over the life of the community is being increasingly recognized, no matter the impact is generally not uniform and self-evident. Against this backdrop it is appropriate to understand that what impact the court has made on the quality of life which we daily live and to what extent the judiciary has been able to preserve and establish the values of the Constitution which we so dearly cherish.<sup>168</sup>

In fact in the U.S., activism is equated with liberalism and is understood in contradistinction with restraint with conservatism. Further judicial activism is not static concept. Activism at present is a different phenomena than it was a generation or two ago. Whereas, the old concept of judicial activism focused mainly on the nullification of legislation, the recent formal conceptions of activism have been expanded. In his widely read book, Raoul Berger argues that the touchstone of activism is a failure to interpret the constitution according to the intent of its drafters.<sup>169</sup> Thus it is generally understood and accepted that, it is activism for courts to act beyond their capacities, their expertise and their traditional functions. It marks a significant change in the court's earlier jurisprudence.

In the Indian Context, the framework of judicial activism is wider because of the unique position given to the judiciary especially to the Supreme Court, under the Constitutional scheme. The Supreme Court is at once, the arbiter of federal principle, the guardian of fundamental rights of the citizens, final interpreter of the constitutional and other organic laws and last but not the least the final judge to determine the validity of even a constitutional amendment. Therefore in India, the judiciary mainly the Supreme Court and the 18 High Court's have a greater scope to be active while discharging various judicial functions. This principle has been pointed out elsewhere in this thesis.

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<sup>168</sup> I.P.Massey, "Judicial Activism and The Growth of Administrative Jurisprudence in India – A Retrospect", *Indian Bar Review* Vol. 17 (1&2): 1990 p.55-56.

<sup>169</sup> Raoul Berger, '*Government by Judiciary: The Transformation of the Fourteenth Amendment*' (Cambridge: Harvard University Press, 1977).



### **3.7 DIFFERENT DIMENSIONS OF JUDICIAL ACTIVISM**

At the outset, it may be stated that judicial activism as a concept has many dimensions. These dimensions vary from one constitution to the other and one particular political ideology to the other. There cannot be any universal applicability of these dimensions. However, a perusal of the existing literature, mostly in the U.S. and India and a survey of the judicial behaviours in these two leading democracies in the world enables a keen observer of this phenomenon to conclude that there can be six possible dimensions of judicial activism.<sup>170</sup>

The six dimensions usually considered to be important by the American Scholars but which can be made applicable equally to the Indian context are as under.

- (1)Majoritarianism;
- (2)Interpretive stability;
- (3)Interpretive fidelity;
- (4)Substance Democratic-Process Distinction;
- (5)Specificity of policy; and
- (6)Availability of Alternative policy maker

In order to understand the applicability of one or more of the above dimensions of judicial activism of the Supreme Court, it would be necessary to analyze each of them in the light of the decisions made by the court in the past.

1. **Majoritarianism:-** Majoritarianism is probably the most frequent criterion used in assessing Supreme Court's activism. When the court exercises judicial review, it substitutes its own public policy preferences for those enacted by elected representatives of the Parliament, State Legislatures or other local bodies. The violation of majoritarianism is most pronounced when the court declares legislation proper as; unconstitutional. Thus when the court nullifies a law made either by the Parliament or any state legislature, the court can be described as active.
2. **Interpretive stability:-** This dimension measures the degree to which a Supreme Court decision either retains or abandons a precedent or existing judicial doctrine. The most visible and dramatic instance of interpretive

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<sup>170</sup> Bardeley C. Canon, and American Scholar has written an excellent Article entitled "*A frame work for the Analysis of Judicial Activism*", published in "Supreme Court Activism and Restraint" Ed. By Stephen C. Halpern & Charles M. Lamb (Lexington: Massachussettes : Toronto, 1984) p.386.

stability occurs when the court explicitly overrules one of its earlier decisions. Thus in India, the interpretation of the concept of “personal liberty” under Article 21 of the constitution and its variance from *A.K.Gopalan v. State of Madras*<sup>171</sup> to *Maneka Gandhi v. Union of India*<sup>172</sup> exhibits a fine example of this kind of judicial activism. A lesser form of interpretive weakens a precedent without formally overruling it. The Interpretation of equality in terms of “reasonable classification” and the shift towards a focus on “rule against arbitrariness” as lay down in *E.P. Royappa v. State of Tamil Nadu*,<sup>173</sup> is a good example of this kind of judicial activism. However, the interpretive stability need not be measured against ‘precedent’ alone. Another base line is the “ongoing interpretation” of the Constitution.

3. **Interpretive Fidelity:** - This dimension measures activism in the Court’s actual or inferential construction of particular provisions of the constitution. Activism occurs when an interpretation does not accord with the ordinary meaning of the wording of the provision and/or with known, consensual intentions or goals of its framers. The court may sometimes ignore the generic language of the constitutional provisions and may assign new meaning to them, in accordance with the changing times and needs of the society. While applying a document which was made about five decades ago to the problems being faced after 50 years, the courts would be called upon to give new construction to the old legislation in the 1950’s and 1960’s and the major shift afterwards is an example of this kind of judicial activism in India. The justification for such new and innovative interpretation seems to be that, what is important is the spirit of the document rather than the working or the framer’s time-bound intentions. Those decisions of the court which appear to be in clear contradiction of one or more constitutional provisions in terms of the ordinary meaning of their wording or which is contrary to the logical implications of two or more provisions considered together, can be safely categorized as highly activist in this category. The best example is the

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<sup>171</sup> AIR 1950 SC 27.

<sup>172</sup> AIR 1978 SC 597.

<sup>173</sup> AIR 1974 SC 555.

way; the Indian Supreme Court has propounded the theory of basic structure to have an indirect control over the amending process of the constitution, contrary to the intention of the legislature.<sup>174</sup>

4. **Substance – Democratic Process Distinction:** - It is argued that there is greater justification for the court's engaging in policy making in some areas than in others. Thus, those decisions of the court which make economic policy regulate the non-political process activities of institutions or groups or impinge upon people's careers, life-styles, or moral or religious values come under this category. In India these decisions also include certain sensitive areas like reservations for oppressed classes, the extent of reservation, the creamy-layer theory and the emergence of the doctrine of legitimate expectation etc.
5. **Specificity of policy:** - While nullification of a law is still a prominent characteristic of judicial activism, in recent years the courts have increasingly become positive policy makers as well. The judicial actions like commandeering governmental agencies to undertake certain polices and taking over the management of schools, hospitals and other institutions come under this category. Positive policy making is most properly categorized as highly activist. It consists of those decisions which in effect, declare or develop a new policy or which specify in detail particular behaviour, governmental agencies need to follow in pursuance of an existing policy. In India, these decisions include the ordering of shifting of polluting industries around Taj Mahal, stopping of aquaculture and a code of conduct for trial of pending criminal cases etc.
6. **Availability of an alternate policy maker:** - Julius stone reminded his brethren in *United States v. Butter*,<sup>175</sup> that "courts are not the only agency of government that must be presumed to have the capacity to govern". Thus when the court makes policy when another agency is engaged or likely to be engaged in meaningful action to meet the problem, it becomes the final way of measuring judicial activism. In other words, when the court substitutes its own policy in alternative to the one of the proper

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<sup>174</sup> The 24<sup>th</sup> Constitutional Amendment in so far it affected the meaning of "Law" under Article 13 and 368. However in *Keshavanand Bharti v. State of Kerala*, AIR 1973 SC 1461, the Supreme Court has asserted itself by invoking the Basic Structure doctrine.

<sup>175</sup> 297 US 1 atp.87 (1937).

policy maker, the decision can be called an active one. In India, the Supreme Court has not become that active to make policy-making a habit. However, recently the Supreme Court has given many clear guidelines in certain specific areas, which can be called the judicial policy making. In the area of pollution prevention, the Supreme court has laid down number of options before the State like closure of industries altogether, shifting of industries from one place to another and the like directions.<sup>176</sup>

Similarly, the Supreme Court has formulated a policy to eradicate child labour in India, by suggesting certain comprehensive measures including payment of compensation to the child labour by their employers.<sup>177</sup> As regards the sexual harassment of working women, the Supreme Court has furnished many guidelines and norms to define and illustrate sexual harassment.<sup>178</sup> These are few instances where the Supreme Court has functioned like an alternative policy-maker, by substituting itself for the legislature, which obviously has failed to do the needful.

A clear analysis of the six dimensions of judicial activism as discussed above makes it clear that these dimensions cannot be isolated from each other and overlapping is bound to happen. Further it could be seen that the nomenclature used to describe the six dimensions is typically American and it is admitted unconditionally that the inspiration has been an American article on the topic.<sup>179</sup> However, it must be stated in this context that the framework is squarely applicable to the Indian scenario also.

From the foregoing above understanding, it becomes obvious that every dimension of judicial activism, in which ever, category it might fall, revolves around the power of judicial review exercised by the court. The judicial activism is either an expansive use of judicial review or refusal to exercise the power of judicial review in a given case.

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<sup>176</sup> In *M.C.Mehta v.. Union of India*.....1996, 1997 *M.C.Mehta vs. Union of India* (1988) 1 SCC 471.

<sup>177</sup> *M.C.Mehta v. Union of India*, (1996) 6 SCC 756.

<sup>178</sup> *In Vishaka v. Stae of Rajasthan* (1997) 6 SCC 241.

<sup>179</sup> Bradley C.Canon, "*A Frame work for the Analysis of Judicial Activism*" published in "Supreme Court: Activism and Restraint" Ed. By Stephen C. Halpern & Charles M.Lamb (Lexington : Massachussettes : Toronto, 1984) p.386.

### **3.8 JUDICIAL ACTIVISM IN INDIA: ITS ORIGIN AND DEVELOPMENT**

Since the establishment of Courts as means of administering justice, law is made from two sources. The prime source is from the legislature and the second is the judge-made law, i.e. judicial interpretation of already existing legislation. The Constitution of India also recognized these two modes of law-making. Article 141 of the Constitution of India lays down that the law as declared by the Supreme Court of India establishes the Law of the State. It thus codifies what was hitherto an unmodified convention, namely, recognition of judge-made law. The process of making law by judges is what can be called Judicial Activism.

Judicial Activism as distinguished from Judicial Passivism means an active interpretation of existing legislation by a judge, made with a view to enhance the utility of that legislation for social betterment. Judicial Passivism, to put it very loosely and liberally is interpretation of existing legislation without an attempt to enhance its beneficial aspects, by so interpreting the existing law as to advance and progress the beneficial extent of that legislation. The phenomenon which is now called Judicial Activism is, therefore, not one of recent origin. It originated with the firm establishment of Courts as means of administration of justice.

For a very long time, the Indian judiciary had taken an orthodox approach to the very concept of judicial activism. However, it would be wrong to say that there have been no incidents of judicial activism in India. Some scattered and stray incidents of judicial activism took place from time to time. But they did not come to the limelight as the very concept was unknown to India. However, the history of judicial activism can be traced back to '1893' when Justice Mehmood of the Allahabad High Court delivered a dissenting judgment which sowed the seed of activism in India. It was a case of an under-trial who could not afford to engage a lawyer. So the question was whether the court could decide his case by merely looking at his papers. Justice Mehmood held that the pre-condition of the case being 'heard' (as opposed to merely being read) would be fulfilled only when somebody speaks. So he has the widest possible interpretation of the relevant law and laid the foundation stone of judicial activism in India.

The Supreme Court of India started off as a technocratic Court in the 1950's but slowly started acquiring more power through constitutional interpretation. In fact the roots of judicial activism are to be seen in the Court's early assertion regarding the nature of judicial review. In *A.K.Gopalan v.State of Madras*<sup>180</sup>, although the Supreme Court conceived its role in a narrow manner, it asserted that its power of judicial review was inherent in the very nature of the written constitution. The Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid". The posture of the Supreme Court as a technocratic Court was slowly changed to be activist Court.

In *Sakal Newspapers Private Ltd. v. Union of India*<sup>181</sup>, it held that a price and page schedule that laid down how much a newspaper could charge for a number of pages was being violative of freedom the press. The Court also conceived a doctrine of giving preferred position to freedom of speech and expression, which includes freedom of the press, over the freedom to do business. The Supreme Court held that at a newspaper was not only a business; it was a vehicle of thought and information and therefore could not be regulated like any other business. In *Balaji v.State of Mysore*<sup>182</sup>, the Supreme Court held that while the backward classes were entitled to protective discrimination, such protective discrimination should not negate the right to equality and equal protection of law. It held that backwardness should not be determined by caste alone but by secular criteria though caste could be one of them, and that the reserved seats in an educational institution should not exceed fifty per cent of the total number of seats. In *Chitralkha v. State of Mysore*<sup>183</sup>, similar restrictions were imposed on the reservation of jobs in civil services. These are examples of judicial activism of the early 1960s.

In these early years of the Indian Supreme Court, the inconvenient decisions of the Supreme Court were overcome through the device of constitutional amendments. The first, the fourth and the seventeenth constitutional amendments removed various property legislations from the preview of judicial review. Therefore, a debate on the

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<sup>180</sup> *A.K.Gopalan v. State of Madras* AIR 1950 SC 27, 34.

<sup>181</sup> *Sakal Newspapers Private Ltd. v. Union of India* AIR 1962 SC 305.

<sup>182</sup> *Balaji v. State of Mysore* AIR 1963 SC 649.

<sup>183</sup> *Chitralkha v. State of Mysore* AIR 1964 SC 1823.

scope of the Parliament's power to amend the Constitution started. A question was raised before the Court in 1951 in *Shankari Prasad v. Union of India*<sup>184</sup>, whether Parliament could use its constituent power under Article 368 so as to take away or abridge a fundamental right. The court unanimously held that the constituent power was not subjected to any restriction. That question was again raised in *Sajjan Singh v. State of Rajasthan*<sup>185</sup>, and this time two judges responded favourably, though theirs was a minority view.

In 1967, *L.C.Golaknath v. State of Punjab*<sup>186</sup> that minority view became the majority view, by a majority of six against five. It was held that Parliament could not amend the Constitution so as to take away or abridge the fundamental rights.

### **3.9 TYPICAL EXAMPLES OF JUDICIAL ACTIVISM IN INDIA**

As, has been already pointed out above, the Indian Judicial activism is wider, broader and more varied compared to the American concept of judicial activism. The probable justification for such a wide scope is the constitutional scheme envisaged by the fundamental law of the land. Thus, apart from exercising the power of judicial review in an expansive manner, to assert itself more, in the interest of Constitutionalism, the Indian Supreme Court has exercised even more and wider powers. The court exercises the power to do anything or to give any direction to render complete justice.<sup>187</sup> The court has assumed to itself the power to determine the validity of even a constitutional Amendment effected under Article 368, in the aftermath of *Keshavanand Bharti v. State of Kerala*.<sup>188</sup> Probably, no court in the world under any form of constitutional government exercises such power. This it can be cited as the best example of judicial activism in India.

Another example of judicial activism is exercise of judicial power to give certain directions to certain political leaders who held high positions and bureaucrats, to compensate the State, for abusing the discretionary powers vested in them. This kind of directions asking the political leaders and bureaucrats to pay exemplary

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<sup>184</sup> *Shankari Prasad v. Union of India* AIR 1951 SC 458.

<sup>185</sup> *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845.

<sup>186</sup> *L.C.Golaknath v. State of Punjab* AIR 1967 SC 1643.

<sup>187</sup> Art.142 of the Constitution.

<sup>188</sup> AIR 1973 SC 1461.

damages to the State is totally unheard of an unprecedented anywhere in the world.<sup>189</sup> It may be noticed that this power has been assumed by the court itself; and it does not exist either under the Constitution or any statute.

The Supreme Court has refused to exercise its advisory jurisdiction under Article 143 of the Constitution in the matter of “Ayodhya” controversy.<sup>190</sup> Such a refusal itself is an example of judicial activism, exhibited in that area probably for the first time in India. Similarly, the court has exercised its power and jurisdiction under Article 129 of the Constitution, to punish for contempt of judiciary. What is remarkable is the fact that the court has exercised this extraordinary power, to punish an alleged condemner who allegedly committed contempt of a High Court and not the Supreme Court itself.<sup>191</sup> However in *‘Supreme Court Bar Association v. Union of India’*,<sup>192</sup> a Constitution Bench of the Supreme Court; overruled the above decision, and kept the question open.

The Supreme Court has broadened the scope of ‘Locus standi’ in the matter of enforcement of fundamental rights of the citizens, by ushering in a new era of “public interest litigation”, starting with the early eighties. The credit for this welcome development goes to a few individual judges of the Supreme Court like Justice P.N. Bhagwati, Justice V.R. Krishna Iyer and Justice Kuldeep Singh, in recent times.

The courts have assumed to themselves the roles of monitor’s and ‘Supervisors’ in certain investigations involving the political bigwigs in certain scandals. The best illustration is the way the Patna High Court has ordered the Central Bureau of Investigation (C.B.I.), a crime investigation agency of the Central Government, to report directly to the High Court, in the Scam which became popular as “fodder scam” allegedly involving the then Chief Minister of Bihar, Laloo Prasad Yadav.

Further, the Supreme Court has assumed to itself the supremacy and primacy in the matter of appointment and transfer of the Supreme Court and the High Court

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<sup>189</sup> As the SC has directed Satish Sharma, A Former Union Petroleum Minister to deposit Rs 50,000,00/- for the wrongful and biased allotment of Petrol Bunks, out of his discretionary quota and Smt. Sheila Kaul, the Former Union Housing and Urban Development to deposit Rs.15,000,00/- for ‘out of turn’ allotment of residential flats in Delhi, towards the exemplary damages.

<sup>190</sup> In *Ismail Farrouqui v. Union of India* (1994) 6 SCC 360.

<sup>191</sup> In *re Vinay Chandra Mishra* (1995) 2 SCC 584: AIR SCW 3488.

<sup>192</sup> AIR 1998 SC 1895.



judges.<sup>193</sup> However, in view of the controversy regarding the recommendation of certain names for the appointment of judges of High Court and Supreme Court, by former Chief Justice M.M. Punchhi, the President has referred the matter to the Supreme Court under Article 143 of the Constitution and a 9-judges bench of the Supreme Court has modified its earlier stand that the Chief Justice of the Supreme Court alone has primacy in recommending such names. In its advisory opinion given in October 1998, the Supreme Court has widened the scope of “consultation” under Article 124 by interpreting that the Chief Justice should consult instead of two senior most judges, four senior judges before making such recommendation. Thus the Supreme Court retains initiative in the matter appointing High Court judges.<sup>194</sup>

Another most conspicuous constitutional area where the Supreme Court has exhibited judicial activism is the way the court has interpreted the Directive principles of State policy contained in Part IV of the Constitution, which are non-justifiable, as justifiable in the garb of fundamental rights. The Court has stretched itself too far when it directed the Union of India to enact a Uniform Civil Code<sup>195</sup> within a time bound period.<sup>196</sup> It is altogether a different matter that the Court had withdrawn its direction subsequently by declaring that the earlier direction was only an “obiter dicta”.

### **3.10 JUDICIAL ACTIVISM IN INDIA, BEFORE 1980’S**

At the outset, it may be stated that, it is difficult to predict any definite pattern, in the behaviour of the Supreme Court before the 1980’s. As Rajeev Dhawan rightly pointed out, while not totally neglecting the unformulated indigenous pressures the court has been mechanical in its approach to the problem on which it was called upon to adjudicate.<sup>197</sup> The Supreme Court had rarely exhibited any activist tendency before the eighties, more precisely before the emergency of 1975. There has been an overwhelming opinion in India that, the judiciary during the 1940’s and 1950’s was used by the elite section of the society to get their vested interest served, of course within the legal frame work. The laws generally favoured the landed-class and the talk of agrarian reforms remained a political rhetoric. The circumstances forced the judges

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<sup>193</sup> *Supreme Court Advocates on Record Assn. v. Union of India* (1993) 4 SCC 44.

<sup>194</sup> See. In *re Special Reference* AIR 1999 SC 1.

<sup>195</sup> Under Art.44, a Directive Principle of State Policy.

<sup>196</sup> In *Sarla Mudgal v. Union of India* (1995) 3 SCC 635.

<sup>197</sup> Rajeev Dhawan, *The Supreme Court of India – A Socio-Legal Critique of its juristic, Techniques* (Bombay, 1977) p.421.

to favour the land-lords, and that forced the judiciary to take a “not-so-progressive” outlook.<sup>198</sup>

The most opportune time to establish a people-friendly judiciary was lost during 1950's. One important point to be noted in this context is that the legal machinery consisting of judges, lawyers and prosecutors came from the same stock, i.e. same caste, class, attitude and orientation: This was one of the major factors for the judiciary not adopting or taking a very progressive approach. In fact certain constitutional experts went on to the extent of calling the Supreme Court before the eighties as a “rich man's court”.<sup>199</sup> The main grouse of the protagonists of the aforementioned view seems to be that in the 1950's the Supreme Court turned to “economic activism” to protect ‘status quo’ that led to judicial passivism in respect of civil and political rights the citizens.<sup>200</sup>

### **3.11 A RANDOM SURVEY OF JUDICIAL BEHAVIOUR BEFORE 1980'S**

An analysis of the following decisions pertaining to agrarian reforms and right to property would be necessary to understand the judicial behaviour before the 1980's In *State of Bihar v. Kameshwar*,<sup>201</sup> the Supreme Court Constitution Bench was asked to determine the validity of the Bihar Land Reforms Act, 1950, The Madhya Pradesh Abolition of Proprietary Rights (Estates Mahals, Alienated Lands) Act, 1950 and the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950. These enactments aimed at abolishing Zamindaries and other proprietary estates and tenures in the three states, so as to eliminate intermediaries by means of compulsory acquisition of their rights and interest, and to bring the ‘raiya'ts’ and other occupants of lands in those areas into direct relation with the Government.

The Supreme Court had declared these laws to be valid.<sup>202</sup> What is surprising is the fact that, Patanjali Shastri, C.J. declared that, “the objections based on the lack of a public purpose and the failure to provide for payment of just compensation are barred under Article 31(4) and also devoid of merits, thus it becomes unnecessary to consider,

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<sup>198</sup> Lyakar Ali, *Justice, Judiciary and Judicial Activism*, (Legal views & News ,New Delhi, Feb 1998) p.26.

<sup>199</sup> Eg. Mohd. Ghouse in his “*The two faces of Judicial Activism*” published in K.L.Bhalia (ed). *Judicial Activism and social change*, (New Delhi, 1990) p.111.

<sup>200</sup> *Ibid* at pp.115-116.

<sup>201</sup> AIR 1952 SC 252.

<sup>202</sup> Except S.4(6) and S.23 (f) of the Bihar Act, 1959.

what is a public purpose and whether the acquisition authorized by the impugned statutes sub serves any public purpose. Nor is it necessary to examine whether the scheme of compensation provided by the statutes is so illusory as to leave the expropriated owners without any real compensation for loss of their property”.<sup>203</sup> This was a classic case of a judiciary unwilling to confront a legislature which passed a law contrary to existing fundamental rights namely the right to property. It is a fine example of judicial passivism of the Supreme Court of 1950’s.

In *Vajravelu v. Spl. Dy. Collector*,<sup>204</sup> the Supreme Court held that a differentiation in the rates of compensation in a law for compulsory acquisition of private property between one public purpose and another has no relation to the object of the Act, impugned in that case.

In *Kunhikoman v.s State of Kerala*,<sup>205</sup> a Constitution Bench of the Supreme Court dealt with the validity of the Kerala Agrarian Reforms Act 1961. The Court, by majority struck down the entire are deprived of their property, one richer than the other, they should be paid at different rates when the property of which they are deprived is of the same kind and differs only in extent”. Thus the court declared that the discrimination in the matter of payment of compensation, to the different land owners based on the impugned provisions was unconstitutional and that they would render the entire Act unconstitutional.

The one case, which stands apart from other cases, in the matter of judicial activism is *L.C. Golak Nath v. State of Punjab*,<sup>206</sup> A 11 judges Special Bench of the Supreme Court, was called upon to determine the Constitutional validity of the Constitution (Seventeenth Amendment), Act, 1964 in the instant case. The court by a majority of 6:5 gave a very bold decision which had far reaching consequences in the coming years. Before discussing the ratio of the judgment, it would be necessary to advert to the facts of the case briefly. The Constitution (seventeenth Amendment) Act, 1964 had amended Art.31-A of the constitution and included two enactments viz the Punjab Security of Land Tenures Act, 1953 and the Mysore Land Reforms Act 1962, in the 9<sup>th</sup> schedule to the Constitution and had placed them beyond attack. Article 31-

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<sup>203</sup> 1952 SC 252 (265).

<sup>204</sup> AIR 1965 SC 1017.

<sup>205</sup> AIR 1962 SC 723.

<sup>206</sup> AIR 1967 SC 1643.

A deals with saving of laws providing for acquisition of estates etc. even though they are inconsistent with or take away any of the rights conferred by Article 14, Art.19 or Art.31.<sup>207</sup>

The court by majority speaking through Supha Rao C.J. declared that:-

- (i) Constitutional Amendment is a legislative process
- (ii) Amendment is law within the meaning of Article 13 of the Constitution and
- (iii) Parliament has no power from the date of the decision<sup>208</sup> to amend any of the provisions of part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein etc.

The most noticeable aspect of this judgment is this decision had secured Constitution domain and established the principle that even the extra-ordinary process of Constitutional Amendment would be fundamental rights, guaranteed in Part III of the constitution. The decision is also important because it has laid down the Constitutional Jurisprudence. This doctrine explains that any amendment that violated the fundamental rights would be valid for all the past purposes i.e. before Golaknath and that it would be invalid only prospectively. Chief Justice Subba Rao exhibited fundamental rights to attain supremacy in the Indian Constitution and in the process had overruled two long outstanding judgments on that topic viz. *Sankari Prasad v. Union of India*<sup>209</sup>, and *Sajjan Singh*.<sup>210</sup>

While overruling the aforementioned earlier judgments, the learned Chief Justice Subba Rao observed:

“While ordinarily this court will be reluctant to reverse its previous decision, it is the duty in the Constitutional field to correct itself as early as possible, for otherwise the future progress of the country and the happiness of the people will be at stake (we are) convinced that the decision in *Sankari Prasad’s case*, is wrong, it is pre-eminently a typical error case where this court should overrule it. The longer it holds the field the greater will be the scope for erosion of fundamental rights. As it contains the seeds of

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<sup>207</sup> As it stood before the Constitution (44<sup>th</sup> Amendment), Act 1978.

<sup>208</sup> i.e. 27-02-967.

<sup>209</sup> AIR 1951 SC 458: 1952 SCR 89.

<sup>210</sup> AIR 1965 SC 845.

destruction of the cherished rights of the people, the sooner it is overruled the better for the country”.<sup>211</sup>

The above observations amply demonstrate a shift in the behaviour of the Supreme Court, from its earlier decisions and it marks a watershed in the history of the Supreme Court’s judicial activism.

In *R.C. Cooper v. Union of India*<sup>212</sup> popularly known as the Bank’s Rationalization case, a 11-judges special Bench of the Supreme Court, was called upon to decide the validity of the Banking Companies (Acquisition and Transfer of undertakings) Ordinance, 1969 and its modified version namely the Banking Companies (Acquisition and transfer of Undertakings) Act of 1969. These two laws were challenged by the petitioner, who was a shareholder as well as a director in some of the nationalized banks. He assailed their validity on the ground that they impair his rights guaranteed under Article 14, 19, and 31 of the Constitution. The Court speaking through Justice J.C. for majority declared that the impugned Act was invalid as it made hostile discrimination against the 14 banks proposed to be nationalized, in that it prohibited them from carrying on banking business, whereas the other Banks, Indian and Foreign were permitted to carry on banking business.

The court further declared that the Act also violated the guarantee of compensation under Article 31(2) in that it provided for giving certain amounts determined according to principles which were not relevant in the determination of compensation of the undertaking of the named banks. The Court for the first time declared that “the validity of the “law” which authorises deprivation of property and “a law” which authorizes compulsory acquisition of property for public purposes must be adjudged by the application of the same test.”<sup>213</sup>

In *Keshavanand Bharti v. State of Kerala*,<sup>214</sup> popularly known as the Fundamental Rights case”, a 13-judges Bench of the Supreme Court dealt with the validity of the Constitution 24<sup>th</sup> Amendment, 25<sup>th</sup> Amendment Act, 1971 was passed to get over the decision of the Supreme Court in *Golak Nath’s case*<sup>215</sup> in so far as it

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<sup>211</sup> *L.C. Golak Nath v. State of Punjab* AIR 1967 SC 1643 at p.1670.

<sup>212</sup> AIR 1970 SC 564.

<sup>213</sup> *Ibid* at p.597.

<sup>214</sup> AIR 1973 SC 1461.

<sup>215</sup> AIR 1967 SC 1643.

was held that (i) the 'law' under Article 13 (2) includes a Constitution Amendment and (ii) Article 368 of the Constitution is related only to the procedure to amend the Constitution but did not confer on the Parliament any power to do so. The 24<sup>th</sup> Amendment expressly empowered the Parliament to amend any provisions of the Constitution including those relating to Fundamental Rights and further made Article 13 of the Constitution inapplicable to an amendment of the Constitution under Article 368.

The principal question before the Supreme Court in Keshavanand was whether the decision in the Golak Nath's case was to be upheld or to be overruled. The Special Bench of the 13 judges unanimously upheld the constitutional validity of the Constitution 24<sup>th</sup> Amendment Act, 1971 and in doing so, overruled the prior decision of the Supreme Court in Golak Nath's case and cleared the way for upholding the validity of the other Constitution Amendment Acts which were questioned before the special Bench in the writ petitions. The summary of the view of the majority of the Special Bench, signed by nine judges out of 13, is as under:

- (i) Golak Nath's case is over ruled
- (ii) Article 368 does not enable Parliament to alter the basic structure or frame work of the Constitution; and
- (iii) The first part of Section 3 of the Constitution (25<sup>th</sup> Amendment) Act, 1971 is valid. The second part, namely "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid etc.<sup>216</sup>

However it may be noted that only the necessary views have been taken here for the purpose of commentary and analysis. The majority of the Special Bench declared that every provision of the Constitution can be amended provided in the result, the basic foundation and structure of the Constitution remain the same.

Basic Structure: - It is pertinent to see that the court had not defined what Constitutes the basic structure of the Constitution. Instead, the learned judges had chosen to illustrate various features as basic features of the Constitution. They include:-

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<sup>216</sup> In Article 31-C of the Constitution.

- (i) Supremacy of the Constitution;
- (ii) Republican and Democratic form of Govt;
- (iii) Secular Character of the Constitution;
- (iv) Separation of powers between the legislature, the executive and the judiciary;
- (v) Federal Character of the Constitution;<sup>217</sup>
- (vi) Fundamental freedoms;<sup>218</sup>
- (vii) Sovereignty of India;
- (viii) Mandate to build a welfare state and egalitarian society;<sup>219</sup>
- (ix) Any of the fundamental rights.<sup>220</sup>

The above list is only illustrative in nature and not exhaustive. What is unique in this context is the fact that there was no uniformity and unanimity in describing the so-called “essential” or “basic” features. In most of the case, the features cited by one judge as basic, overlapped with; those cited by other judges.

It so transpires from the above discussion that, whereas the Supreme Court had succeeded in *Golaknath*, in making even a Constitutional Amendments, the same court, through a larger bench had overruled *Golaknath* but assumed to itself an unprecedented power to test the validity of the Constitutional Amendment.

On one hand, the court upheld the validity of the 24<sup>th</sup> Constitution Amendment, 1971 in so far as it excluded a constitution Amendment from the ambit of ‘law’ and in the process overruled the earlier decision in *Golaknath*. On the other hand, the court assumed to itself, the power to test the validity of a Constitution Amendment indirectly, i.e. in the garb of “basic Structure” doctrine. This power has no parallel in the modern Constitutional jurisprudence. Even the United States Supreme Court, considered to be the most powerful Supreme Court in the entire world does not exercise such power. It is the height of the judicial activism of the 9-judges of the Supreme Court to claim such an extra-ordinary power. Perhaps there can be no other

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<sup>217</sup> Per Sikri, C.J..

<sup>218</sup> Per Shelat and Grover, J.J.

<sup>219</sup> Per Hedge and Mukherjee JJ.

<sup>220</sup> Per Jaganmohan Reddy, J.

better example of judicial activism in India, than the one exhibited by the Supreme Court in *Keshavanand Bharti*.

**Derivative immunity and Fundamental Rights:** - In *Prag Ice & Oil Mills v. Union of India*,<sup>221</sup> the Supreme Court 7-judges Bench was asked to determine the extent of immunity granted to certain Acts and Regulations specified in the Ninth Schedule to the Constitution on the ground of violation of fundamental rights. It may be noted that under Article 31-B of the Constitution, which was inserted by the Constitution (1<sup>st</sup> Amendment) Act, 1951, none of the Acts and Regulations specified in the Ninth Schedule shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the fundamental rights guaranteed in Part III of the Constitution. Answering in the negative, the Special Bench, by majority of 6:1 held that, the upholding of laws by the application of the theory of derivative immunity is foreign to the scheme of our Constitution and that accordingly orders and notifications issued under the Acts and Regulations specified in the Ninth schedule must meet the challenge that they offend the fundamental rights guaranteed by Part III of the Constitution. The Court emphatically declared that the immunity enjoyed by the Parent Act by reason of it being placed in the Ninth Schedule cannot *proprio vigore* be extended to an offspring of the Act like a price control order issued under the authority of the Act.

This judgement is a silver lining in the establishment of the principle that the executive orders cannot be placed beyond the reach of the judiciary under the disguise of derivative immunity.

**Personal liberty and Judicial Activism:** - Right to life and personal liberty is the most important fundamental right guaranteed in Part III of the constitution. The Supreme Court has been encountered with the task of interpretation of various terms used under Article 21 of the Constitution reads as under:

“No person shall be deprived of his life or personal liberty except according to procedure established by law”

The Court has been called upon to interpret the meaning of “life”, “personal liberty”, “procedures established” and “law” as they appear under Article 21 of the

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<sup>221</sup> *Prag Ice & Oil Mills v. Union of India* AIR 1973 SC 389.



Constitution. It is pertinent to see that till 1978 i.e. till the landmark decision of *Maneka Gandhi v. Union of India*.<sup>222</sup> The Supreme Court had interpreted the above terms very narrowly. In order to ascertain the judicial behaviour, it becomes imperative to analyse the case law at random on Article 21 up to the year 1978.

In *A.K. Gopalan v. State of Madras*,<sup>223</sup> the first case decided by the Supreme Court of India involving the interpretation of right to life and personal liberty guaranteed under Article 21 of the Constitution, the apex court was called upon to determine the constitutional validity of the Preventive Detention Act, 1950. A special bench of the court consisting of 6 judges held by majority that the Preventive Detention Act, 1950 minus its Section 14 was “intra vires” the Constitution and valid. The court has dealt with at great length, the scope of “right to freedom” and “Personal Liberty” as used in Articles 19 and 21 of the Constitution respectively, among other important Constitutional issues.

As regards the inter relation between Articles 19 and 21 the court held that Article 19, guaranteeing various freedoms to the citizens, cannot be said to be dealing with substantive law, merely, nor Article 21, with matters of procedure. The court further held that Articles 19 and 21 are not complementary to each other.<sup>224</sup>

As regards the “personal liberty”, the court opined that the constitution has in Article 21 used the words ‘personal liberty’ which have a definite connotation in law and that ‘personal liberty’ stating that it means a personal right not to be subjected to “imprisonment”, “arrest” or other “physical coercion” in any manner that does not admit of legal justification.<sup>225</sup> Patanjali Shastri J. Held that the expression ‘personal liberty’ as used in Article 21 excludes the freedom dealt within Article 19.

Only the dissenting opinion of Fazal Ali, J. admitted that ‘personal liberty’ and ‘personal freedom’ have a wider meaning, so as to include not only immunity from arrest and detention but also freedom of speech, and freedom of association etc.<sup>226</sup>

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<sup>222</sup> AIR 1978 SC 597.

<sup>223</sup> AIR 1950 SC 27.

<sup>224</sup> AIR 1950 SC 27, in para 215.

<sup>225</sup> Per Das, J, at paras 219 and 220, Ibid.

<sup>226</sup> *Ibid*, at paras 177, 178 Per B.K. Mukherjeed.

Justice Patanjali Shastri held that Article 21 is not designed to afford protection against infringements by the executive or individuals.<sup>227</sup>

Four out of the 6 judges held that ‘law’ under Article 21, in the expression “procedure established by law”, has not been used in the sense of “general law” connoting what has been prescribed as the principles of natural justice, outside the realm of positive law. The majority declared that ‘law’ in Article 21 is equivalent to *state-made law*.<sup>228</sup>

Even though this landmark judgment dealt with many other aspects, for the purpose of the present discussion it would be sufficient to mention in brief, the summary as regards Article 21 of the Constitution.

- (i) Article 19 and 21 are not complementary to each other.
- (ii) ‘Personal liberty’ under Article 21 means liberty of the body and immunity from illegal arrest, detention or physical coercion.
- (iii) ‘Law’ means only the state-made law.
- (iv) ‘Article 21’ strikes at only the procedure and not the ‘law’ even if it is illegal. In other words Article 21 incorporates only the procedural due process but not the substantive due process.

This narrow interpretation by the Supreme Court has prevented the judiciary in India for 28 long years from giving a liberal meaning and scope to the right to life and personal liberty” under Article 21 in particular and to the fundamental rights in general.<sup>229</sup> There was absolutely no judicial activism or liberalism in the instant case and there was only an absolute restraint exercised by the judiciary.

However, as regards the power of judicial review, the Supreme Court speaking through Chief Justice Kania made some remarkable observations which are as under:<sup>230</sup>

The inclusion of clauses (1) and (2) of Article 13 in the Constitution of India appears to be a matter of abundant precaution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment the court has always the power to declare the enactment; to the extent it transgresses the limits, invalid. The

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<sup>227</sup> *Ibid*, at para 59.

<sup>228</sup> *Ibid* at para 18, 109 and 193.

<sup>229</sup> Till the landmark case of *Maneka Gandhi v. Union of India* AIR 1978 SC 597.

<sup>230</sup> In para 6, *Ibid*.

existence of Article 13 (1) and (2) in the Constitution of India, therefore is not material.....”.

This declaration is the only silver lining, in otherwise a very narrow decision of the Supreme Court.

It may be seen that between 1950 and 1978 i.e. *A.K. Gopalan and Maneka Gandhi*, the supreme Court has given very few liberal decisions which expanded the scope of life and personal liberty under Article 21 of the constitution, thanks to the lack of will power on the part of the Supreme Court to assert itself in expanding a liberal fundamental rights jurisprudence. Some of these decisions may be discussed, at random in this context.

Again, the meaning and scope of ‘personal liberty’ came up pointedly for consideration in *Kharak Singh v. State of U.P.*<sup>231</sup> In that case validity of the Uttar Pradesh Police Regulations which without any statutory basis, authorized the police to keep under surveillance persons whose names were recorded in the “history sheet” maintained by police in respect of persons who are or are likely to become habitual criminals. In this context ‘Surveillance’ as defined in the impugned regulation included secret picketing of the house, domiciliary visits at night, periodical enquiries about the person and an eye on his movements etc. The petitioner alleged that this regulation violated his fundamental right to movement in Article 19 (1) (d) and personal liberty in Article 21. For determining the claim of the petitioner, the Court, apart from defining the scope of Article 19 (1) (d), had to define the scope of ‘personal liberty’ in Article 21 also. A 6 judges Special Bench of the Supreme Court by majority rejected the argument of the State Government that ‘personal liberty’ was confined to ‘freedom from physical restraint or freedom from confinement within the bounds of a prison’ and held that “personal liberty” used in the article as a compendious term to include within itself all the varieties of rights which go to make up the ‘personal liberties’ of the man other than those dealt within the several Clauses of Article 19(1).

Raja Gopala Ayyangar, J declared that<sup>232</sup> the word ‘life’ in Article 21 means not merely the right to the continuance of a person’s animal existence, but a right to the possession of each of his organs – his arms and legs etc. The learned judge speaking

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<sup>231</sup> AIR 1963 SC 1295.

<sup>232</sup> At p. 1302. *Ibid.*

for himself and other 3 judges declared that an unauthorized intrusion into a person's home and the disturbance caused to him thereby is violative of Article 21. The majority declared that Regulation 236(b), which authorized 'domiciliary visits' was unconstitutional on the aforementioned ground. Justice Koka Subb Rao (as he then was) for himself and Shah, J gave a separate but concurrent judgment to the same effect on the ground that "the right to personal liberty takes in it not only right to be free from restrictions placed on his movements, but also free from encroachments, on his private life", and defined the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.

It may be noticed in this context that for the first time in the history of its existence the Supreme Court had departed from the rigid interpretation it gave to Art. 21, in the case of A.K. Gopalan and made an attempt to broaden the ambit of 'personal liberty' under Article 21, short of saying that 'right to privacy is a fundamental right' under Article 21 of the Constitution. Thus Kharak Singh is one of the activist decisions of the Supreme Court before the Eighties.

However, in *Govind v. State of M.P.*<sup>233</sup> the same court contemplated a right to privacy, included among others, in the right to personal liberty but upheld regulations similar to the one invalidated in Kharak Singh, because the regulations had statutory basis.

In *Re, Under Article 143, Constitution*,<sup>234</sup> a 7-judges Special Bench of the Supreme Court dealt with an apparent conflict between the privileges of a legislature under Article 194 of the Constitution and the fundamental rights of the Citizen under Article 19 and 21 etc. In the instant case, one *Keshav Singh*, who allegedly printed and published a pamphlet containing a disrespectful letter to the speaker of the Uttar Pradesh Assembly, was committed to prison on the directions of the speaker, on the ground that Keshav Singh committed contempt of the Legislature. However, a petition was filed before the High Court on behalf of the alleged condemner under Article 226 on the ground that his detention was illegal. The Division Bench which heard the

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<sup>233</sup> AIR 1975 SC 1378: (1975) 2 SCC 148.

<sup>234</sup> AIR 1965 SC 745.

petition ordered the release of the petitioner on bail. On receiving the information of release order, the Assembly passed a resolution that the two judges of the High Court, Keshav Singh and his advocate had committed contempt of the House and ordered that the two judges and advocate be brought before the Assembly. On hearing about this order, the two judges and the advocates moved the High Court separately and a full Court of the High Court ordered by a notice restraining the speaker of the Assembly from issuing the warrant in pursuance of the direction of the Assembly. At that stage the President of India made reference under Article 143 of the Constitution to the Supreme Court.

This case assumed great Constitutional significance as it involved an apparent conflict between the privileges of legislature on one side and the fundamental rights and freedoms of the citizens who are not members of legislature on the other. Further there was an institutional conflict between the legislatures and there was an institutional conflict between the legislature and the judiciary, as it involved two sitting judges of the High Court.

The Supreme Court by a majority of 6:1 speaking through Chief Justice P.B. Gajendragadkar held that it was not competent for the legislative Assembly of U.P. to direct the production of the two Hon'ble Judges and the Advocate before it in custody. Even though the court directly did not declare that there was a conflict between the legislative privileges and immunities, and fundamental rights of citizens, the very opinion of the court reflects an activism on the part of the judiciary. For the first time, the Court held though indirectly that, in case of fundamental rights and legislative privileges conflict, the former shall prevail. This course of action was not taken by the Supreme Court hitherto and that is the precise reason why this case becomes one of those rare cases before 1980's that witnessed the activism of the Supreme Court.

In *Satwant Singh v. A.P.O., New Delhi*,<sup>235</sup> a Constitution Bench of the Supreme Court, by a majority of 3:2 speaking through Koka Subba Rao, C.J. held that liberty under Article 21 of our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution and the expression "personal liberty" in Article 21 only excludes the ingredients of "liberty" enshrined in Article 19 of the Constitution. The court went on to hold that,

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<sup>235</sup> AIR 1967 SC 1836.

the expression “personal liberty” in Article 21 takes in the right of locomotion and to travel abroad. In other words, the Supreme Court had enlarged the scope of “personal liberty” under Article 21, so as to include the right to travel abroad. The majority declared that the right to travel abroad is a fundamental right and that since there was no law regulating or depriving a person of such a right, refusal to give passport or withdrawal of one given violates Articles 21 and 14 of the Constitution.

This judgment is important because, it was one of the earliest instances when the supreme Court admitted that “personal liberty” under Article 21 has a wider amplitude than ;the liberty of the person (body) as interpreted in *A.K. Gopalan, ADM Jabalpur v. Shivakant Shukla*,<sup>236</sup> is another famous but controversial judgment, given by the Supreme Court before 1980. In this case the presidential order dated 27<sup>th</sup> June, 1975 under Cl.(1) of Article 359 which provided that no person has locus standi to move writ petition under Article 226 before a High Court for “habeas corpus” or any other writ or order or direction to enforce any right to personal liberty of a person detained under MISA on the grounds that the order of detention is illegal or malafide, was challenged. In other words, the Presidential order deprived ‘locus standi’ to a person to move writ petition challenging legality of detention under the Maintenance of Internal Security Act, 1971.<sup>237</sup>

The Instant judgment was the result of series of appeals against judgments of the High Courts of Allahabad, Bombay, Delhi, Karnataka, M.P. Punjab and Rajasthan, which held that notwithstanding the continuance of emergency and the presidential order suspending the enforcement of fundamental rights conferred by Articles 14, 21 and 22, the High Courts can examine whether an orders of detention is in accordance with the provisions of the MISA. The High Court’s also held that in spite of suspension of enforcement of fundamental rights, conferred by Articles 21 and 22 of the Constitution, a person’s right to freedom from arrest or detention except in accordance with law can be enforced only where such arrest and detention are not in accordance with those provisions of the statute. Further, the High Court’s held that the High Courts could not go onto the questions whether the proclamation of Emergency was justified or whether the continuance was malafide.

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<sup>236</sup> AIR 1976 SC 1207.

<sup>237</sup> A Law relating to preventive Detention.

A Constitution Bench of the Supreme Court by majority of 4:1 upheld the presidential order and legitimized the suspension of the writ of “habeas corpus” during the period of emergency on the basis of higher claims of national security. The majority opinions by and large relied primarily on the language of presidential orders. Obviously the majority judges failed to appreciate the gravity of the situation and they were not bold enough to call spade a spade probably due to the effect of the emergency. On the other hand, Khanna, J gave a dissenting opinion emphasizing the role of “rule of law” as the accepted norm of all civilized societies, and observed that it would not cease to be such unless its negation has been brought about by the statute. The learned judge observed:<sup>238</sup>

“Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law...without such sanctity of life and liberty the distinction between a lawless society and one governed by laws would cease to have any meaning”.

In his summary of conclusions,<sup>239</sup> the learned judge declared that –

- (i) Article 21 cannot be considered to be the sole repository of the right to life and personal liberty;
- (ii) Even in the absence of Article 21, the State cannot deprive a person of his life or personal liberty without the authority of law; and
- (iii) According to Article 21, no one can be deprived of his life or personal liberty except in accordance with procedure established by law.....when Article 21 is in force, law relating to deprivation of life and personal liberty must provide both for the substantive power as well as the procedure for the exercise of such power.

The learned judge, went on to hold that, when the right to move any court for enforcement of Article 21 is suspended, it would have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his life or personal liberty, it cannot have the effect of permitting an authority

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<sup>238</sup> AIR 1976 SC 1207, at p. 1256.

<sup>239</sup> *Ibid.*, at pp. 1276 ff.

to deprive a person of his life or personal liberty without the existence of such substantive power.

The dissenting opinion of Justice Khanna has been; hailed as humanitarian and correct decision by the jurists.<sup>240</sup> For its sheer straightforwardness and foresight, the decision can be described as a bold decision in the advent of emergency and the talk of committed judiciary. The judicial activism of the sole Judge Khanna who gave a dissenting judgment resulted in negating the majority decision by the 44<sup>th</sup> Amendment of the Constitution as well as subsequent judicial interpretation. As a result of this bold decision and judicial activism of Justice Khanna, now the enforcement of Article 20 and 21 cannot be suspended in any situation and even the proclamation of National Emergency also cannot affect their enforcement, under Article 359 of the Constitution.

*Maneka Gandhi v. Union of India: A Watershed in Indian Judicial Activism:*

If there is one Judgment of the Supreme Court which revolutionized the interpretation of Article 21 which guarantees the right to life and personal liberty, it is *Maneka Gandhi v. Union of India*.<sup>241</sup> This judgment has woken the Indian judiciary from the deep slumber, as regards the life and personal liberty guaranteed under Article 21 of the Constitution.

In the instant case, the petitioner, Mrs. Maneka Gandhi's passport was impounded by the Union of India in "Public interest" by an order dated July 2, 1977. The Government of India declined to furnish the reasons for its decision "in the interest of the general public". There upon she filed a writ petition under Article 32 of the Constitution before Supreme Court to challenge the orders, on the following among other grounds.

- (i) To the extent to which Section 10(3)(c) of the Passports Act, 1967 authorises the passport authority to impound a passport "in the interests of the general public", it is violative of Article 14 of the Constitution since it confers vague and undefined power on the passport authority;

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<sup>240</sup> Upendra Baxi, *The Indian Supreme Court and Politics* (1980), p.103.

<sup>241</sup> AIR 1978 SC 597.



- (ii) Section 10(3)(c) of the Act is violative of Article 21 of the Constitution since it does not prescribe 'procedure' within the meaning of that article and if it is held that procedure has been prescribed, it is arbitrary and unreasonable; and
- (iii) Section 10(3)(c) offends against Art. 19(1)(a) and (g) of the Constitution, since it permits restrictions to be imposed on the rights guaranteed by those provisions even though the restrictions are such as cannot be imposed under Article 19(2) or (6).

The reasons for which it was considered necessary in the interest of the general public to impound her passport were, however, disclosed in the counter-affidavit filed on behalf of the Government of India in answer to the writ petition. The disclosure stated that the petitioner's passport was impounded because her presence was likely to be required in connection with the proceedings before a Commission of Inquiry.

It was held by the Supreme Court 7-Judges Bench that it could not be said that a good enough reason had been shown to exist for impounding the passport of the petitioner. Furthermore the petitioner has had no opportunity of showing that the grounds for impounding it were unreasonable. Surprisingly having stated as above, the Supreme Court declared that Section 10(3)(c) of the passports Act did not offend Articles 14, 19(1)(a) or (g) or 21 of the Constitution. However, the Attorney General filed a statement on behalf of the Union Government that the petitioner could make a representation in respect of impounding of passport and that the representation would be dealt with expeditiously and that, even if the impounding was confirmed, it would not exceed a period of six months from the date of the decision that might be taken on the petition's representation. In view of the categorical statement of the Attorney General, it was held by the Supreme Court by majority that it was not necessary to formally interfere with the impugned order. Beg. C.J. however, took the view that, as the orders actually passed against the petitioner was neither fair nor proper according to the procedure; he would quash the order and direct the impounded passport to be returned to the petitioner.

**Long Term Impact of the Judgment:** The majority view of the Bench delivered by Bhagwati, J (as he then was) for he Untwalia J<sup>242</sup> and Murtaza Fazal Ali, J, speaks of the most important contribution made by the judiciary for the development of constitutional jurisprudence relating to the “life and personal liberty” under Article 21 of the Constitution. The majority dealt with, at great detail (i) the meaning and content of personal liberty in Article 21 (ii) the Inter-relationship between Articles 14, 19 and 21 (iii) the extent of territory, to which freedom of speech and expression is confined (iv) whether the right to go abroad is covered by Articles 19 (1) (a) or (g) and (v) the application of the doctrine of natural justice, to administrative action etc., among the other issues.

A brief summary of the conclusions arrived by the majority would throw light on the extent of activism present in the judicial interpretation. The following priceless statements were made by Justice Bhagwati, which have had a short term as well as a long term impact on the life and personal liberty of any person in India.

- (i) The expression “Personal liberty” in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man, and some of them have been raised to the status of distinct fundamental ;rights given protection under Article 19.<sup>243</sup>
- (ii) The procedure (in Article 21) cannot be arbitrary, unfair and unreasonable<sup>244</sup>.
- (iii) Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of ‘personal liberty’.....such law in so far it abridges or takes away any fundamental rights under Article 19 would have to meet the challenge of that article.<sup>245</sup>
- (iv) If a law depriving a person of ‘personal liberty’ and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article

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<sup>242</sup> AIR 1978 SC 597 PP. 616 TO 651 paras 50 to 92.

<sup>243</sup> AIR 1978 SC 597 at p.622.

<sup>244</sup> *Ibid*, at p. 622.

<sup>245</sup> *Ibid*.... It may be seen that the majority interpreted Article 21 as incorporating the principle of substantive due process.

19 which may be applicable in a given situation, *ex hypothesis* it must also; be liable to be tested with reference to Article 14.<sup>246</sup>

- (v) Freedom of speech and expression guaranteed by Article 19(1)(a) is exercisable not only in India but also outside.

### **3.12 POST EMERGENCY DEVELOPMENT OF JUDICIAL ACTIVISM**

When we look at post emergency activism, we would see the Supreme Court distancing from legal positivism. The Supreme Court took advantage of several opportunities to expand the rights of the people through liberal interpretation of the constitutional provisions regarding the right to equality and the right to personal liberty. The Supreme Court departed from its earlier strategy of constructing each Article of the Constitution separately and started interpreting the bill of rights as a whole. It gave expansive meanings to the words ‘life’, personality, liberty and ‘procedure established by law’ contained in Article 21 of the Constitution to protect the rights of justice-starved millions like bonded labour, unorganized labour, prisoners, hutment dwellers, pavement dwellers and all other kinds of have-nots and to take up cudgels for the ordinary citizen by coming down heavily against abuse of powers by and inaction of the public authorities.

The theory of judicial activism received impetus in the case of *Maneka Gandhi v. Union of India*<sup>247</sup>, where the Apex Court substituted the due process clause in Article 21 instead of ‘procedure established by law’ in order to bypass the absolutism of the Executive and its interference with individual freedom. It was a land mark example of amplifying the law to enhance personal rights and fundamental rights. In this case, the legislation governing grant of passport was interpreted in a manner so as to enhance the rights of personal freedom and personal liberty. In course of time, the PILs carried on with the task of unearthing many scams, providing justice to the citizens and also to enhance their rights.

In *Minerva Mills Ltd. v. Union of India*<sup>248</sup>, the Supreme Court highlighted the position of Part IV of the Constitution. It is true, Part-III of the Constitution embodied

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<sup>246</sup> *Ibid.*

<sup>247</sup> *Maneka Gandhi v. Union of India* AIR 1978 SC 853.

<sup>248</sup> *Minerva Mills Ltd. v Union of India* AIR 1980 SC 1789.

fundamental right and Part IV contended the directive principle of the State policy. The Constitution is founded on the bed rock of the balance between Part-III and Part IV of the Constitution. To give absolute primacy to one over other is to disturb the harmony of the Constitution. This harmony and balance between fundamental right and directive principle is an essential feature of the basic structure of the Constitution.

It was held by the Supreme Court of India in this *Minerva Mills* case that in cases of extreme urgency and public importance it may be necessary for an authority, judicial or quasi-judicial or executive, to act quasi judicially to make immediate orders in which circumstances it may not be possible to implement the maxim audi alteram partem in its true spirit. It was held that such order would be valid if followed by a post order hearing or post decision hearing. By this judgment the Supreme Court envisaged the quasi-judicial or judicial authorities to be as fair, fearless and confident as to change their earlier decision on patient and impartial hearing after the decision is rendered. It has given yet another dimension to the age old legal requirement of audi alteram partem.

### **3.12.1. AFTER EFFECTS OF MANEKA'S CASE**

Once the Pandora's Box was opened in *Mrs. Maneka Gandhi's case*, the Supreme Court of India following the principles of Judicial Activism decided various cases. In the cases of *Bandhua Mukti Morcha*<sup>249</sup>, and *Mukesh Advani v. State of Madhya Pradesh*<sup>250</sup>, focusing on the problem of bonded labour Supreme Court held, "In India where the constitutional goal is to secure social and economic justice to all its citizens by several cases in the form of Public Interest Litigation, bonded labour problem is worse than slavery."

In *Union of India v. Raghbir Singh*<sup>251</sup>, Supreme Court held, "It used to be disputed that Judges make law. Today, it is no longer a matter of doubt that substantial volume of the law governing the lives of citizens and regulating the functions of the State flows from the decisions of the superior courts.

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<sup>249</sup> *Bandhua Mukti Morcha's case* AIR 1984 SC 802.

<sup>250</sup> *Mukesh Advani v. State of Madhya Pradesh* AIR 1985 SC 1363.

<sup>251</sup> *Union of India v. Raghbir Singh* AIR 1989 SC 1933.

In *Pomal Kanji Govindji v. Vrajlal Karsandas Purohit*<sup>252</sup>, Supreme Court held, “The law must respond and be responsible to be felt and discernible compulsions of circumstances that would be equitable, fair and just and unless there is anything to the contrary in the statute, court must take cognizance of that fact and act accordingly. In *M.C.Mehta v. Union of India*<sup>253</sup>, the Apex Court held, “Where a law of the past does not fit in the present context, court should evolve a new law.” In the same case it further observed, “Law should keep pace with changing socio-economic norms.”

In *National Workers Union v. P.R. Ramakrishnan*<sup>254</sup>, the Apex Court held, “If the law fails to respond to the needs of the changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adopting itself to the fast changing society and not lag behind. It must shake off the inhibiting legacy of its colonial past and assume a dynamic role in the process of social transformation.”

In *Central Inland Water Transport Corporation v. Brojo Nath Ganguly*<sup>255</sup>, Supreme Court held, ‘Law should move forward in tune with the changed ideas and ideologies of the society.

In *Vellore Citizens’ Welfare Forum v. Union of India*<sup>256</sup>, Supreme Court held, “The constitutional and statutory provisions protect a person’s right to fresh air, clean water and pollution-free environment. But the source of the right is the inalienable common law right of clean environment. Our legal system having been founded on the British Common law the right of a person to a pollution-free environment is a part of the basic jurisprudence of the land. Inaction on the part of authorities directed by the Act, make it imperative for the court to pass suitable necessary directions.

In *India Council for Enviro-legal Action v. Union of India*<sup>257</sup>, Supreme Court held, “In public interest litigation, High Courts must shoulder greater responsibilities in taking up local issues of which they can have closer awareness and easy monitoring such as ecological matters in their respective states in the light of law laid down by the

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<sup>252</sup> *Pomal Kanji Govindji v. Vrajlal Karsandas Purohit* AIR 1989 SC 436.

<sup>253</sup> *M.C.Mehta v. Union of India* AIR 1987 SC 1086.

<sup>254</sup> *National Workers Union v. P.R.Ramakrishnan* AIR 1983 SC 75.

<sup>255</sup> *Central Inland Water Transport Corporation v. Brojo Nath Ganguly* AIR 1986 SC 1571.

<sup>256</sup> *Vellore Citizens’ Welfare Forum v. Union of India* (1996) 5 SCC 281.

<sup>257</sup> *Indian Council for Enviro-legal Action v. Union of India* (1996) 5 SCC 281.

Supreme Court. With rapid industrialization taking place, there is an increasing threat to the maintenance of the ecological balance. The general public is becoming aware of the need to protect environment. Even though, laws have been passed for the protection of environment, the enforcement of the same has been tardy, to say the least. With the governmental authorities not showing any concern with the enforcement of the said Acts, and with the development taking place for personal gains at the expense of environment and with disregard of the mandatory provisions of law, some public-spirited persons have been initiating public interest litigations. The legal position relating to the exercise of jurisdiction by the courts for preventing environmental degradation and thereby, seeking to protect the fundamental rights of the citizens, is now well settled by various decisions of the Supreme Court.

In *G.B. Pant University of Agriculture Technology v. State of UP*<sup>258</sup>, the Apex Court held, “In case of deprivation of the weaker section the Court must rise to the occasion and grant relief to a seeker of justice in a just cause. The socialistic concept of society as laid down in Part-III and Part-IV of the Constitution ought to be implemented in the true spirit of the Constitution. The democratic socialism aims to end poverty, ignorance, diseases and in equal opportunity. When cafeteria is required by the regulation to be maintained in a residential University and compulsorily to be used by the resident-students the workers of such cafeteria were held to be the employees of the Universities. They are entitled to be regularized and entitled to parity in employment.

In *Debu v. State of Maharashtra*<sup>259</sup>, it was held that the judicial review is the heart and soul of the constitutional scheme. Judiciary is the ultimate interpreter of the Constitution and has the assigned task of determining the extent and scope of the powers conferred on each part of the Government and thus ensures that no branch transgresses its limits.

In *State of Karnataka v. Appa Balu Ingale*,<sup>260</sup> it was held that the power of judicial review should be exercised to supplement changing social needs and values

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<sup>258</sup> *G.B. Pant University of Agriculture and Technology v. State of UP* 2000 7 SCC 109 : AIR 2000 SC 2695.

<sup>259</sup> *Debu v. State of Maharashtra* (2000) 8 SCC 437.

<sup>260</sup> *State of Karnataka v. Appa Balu Ingale* 1992 (3) Scale 339.

and felt necessities of the time having regard to social inequities,. Inequalities and imbalances the law intended to remove.

### **3.12.2 DANIEL LATIFI'S CASE**

This case is the best example of judicial activism of the judiciary and its constructive and creative interpretation. As we all know that Muslim Women's (Right on Divorce) act, 1986, was passed by Parliament in response to the protest lodged by Muslims against the Shah Bano decision. This was indeed a retrograde step. It was also disliked by many forward-looking Muslims. Daniel Latifi, a senior advocate of the Supreme Court and a scholar of Muslim law, filed a writ petition challenging the validity of the Muslim Women's Act. The petition came up for a hearing in the year 2001 and was finally decided upon on 28 September 2001.<sup>261</sup> Section 3(1)(a) of the Muslim Women's Act provided that a divorced woman was entitled to a reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband. It was held that a divorced Muslim woman was entitled to a fair and reasonable provision for the future extending beyond the period of iddat. The High Courts of Gujarat, Kerala, Madras, Bombay and Punjab confirmed the above interpretation. The High Courts of Andhra Pradesh, Calcutta, Madhya Pradesh, and Delhi took the opposite view and held that the husband's liability would end after providing maintenance for the period of iddat. The Supreme Court had before it two plausible interpretations which the High Courts had taken while construing Section 3(1)(a) of the Act. Kapila Hingorani and Indira Jaising appearing for the petitioner argued that the act was 'un-islamic, unconstitutional' and had 'the potential of suffocating the Muslim women According to the, it undermined the secular character which was the basic feature of the Constitution and there was no rhyme or reason to deprive the Muslim women of the applicability of the provisions of Section 125 Cr.Pc. and therefore it violated Articles 14 & 21 of the Constitution. By excluding Muslim women from the benefits of Section 125 Cr.P.C, act discriminated between women and women on the ground of religion, it was said.

Mr. Y.H. Muchhala, appearing on behalf of the All India Muslim Personal Law Board submitted that the main objective of the Act was 'to undo *Shah Bano case*'. He submitted that in interpreting Section 3(1)(a) of the Act, the expressions 'provision;'

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<sup>261</sup> *Daniel Latifi v. Union of India* (2001) 7 SCC 740.

and maintenance were clearly the same and not different as had been held by some High Courts. He contended that the aim of the Act was not to punish the husband but avoid vagrancy and, in that context, the provisions contained in Section 4 making other relations who were potential heirs or the Wakf Board liable were good enough. He insisted that the court would have to bear in mind the social ethos of the Muslims and impugned Act was consistent with law and justice. He further contended that Parliament had enacted the impugned Act respecting the personal law of the Muslims and that itself was a legitimate basis for making the differentiation. A separate law for a community on the basis of personal law applicable to such community could not be held to be discriminatory.

Dr.A.M.Singhvi, appearing for the National Commission on Women, submitted that the interpretation placed by the decisions of the High Courts of Gujarat, Bombay, and Kerala, and the minority view of the High Court of Andhra Pradesh should be accepted and; if such interpretation was accepted, the; impugned act would remain constitutionally valid.

The Supreme Court in a 5 judges bench (comprising of Justice Rajendra Baby, Justice Patnaik G.B., Justice Mohapatra D.P. Justice Doraisway and Justice Shivraj Patil) decision held that only if section 3(1)(a) was interpreted so as to oblige the husband to pay maintenance and make provision for the future within the period of iddat, the Act would be saved from the infirmity arising from the inconsistency with Articles 14,15 and 21 of the Constitution. It therefore, adopted that interpretation in pursuance of the policy of not striking down a law if it could be saved by an interpretation that avoided such invalidity. The technique of statutory construction is well known to courts in the common law world. The English courts find such subtle judicial activism convenient since they cannot declare an act of Parliament invalid. The courts in India have often used such a strategy while interpreting the provisions of the Constitution, including the amendments to the Constitution. This has a political dimension. Where a court can strike down a law as being unconstitutional, it may choose not to do so by adopting an interpretation that saves it. Where courts cannot strike down a law, they adopt an interpretation that in their view is; more consistent with the Constitution. This is what the English courts do when they find a conflict between an Act of Parliament and a provision of the European Convention on Human



Rights to which England is now a signatory. In that process, sometimes they construe a law totally differently from what the legislature had intended.

### **Recent examples of Judicial Activism**

**2G Spectrum and commonwealth scam** cases are glaring examples to show that how PIL can be used to check the menace of corruption in Indian Administration. In both these cases matter was initiated at the instance of public spirited person by way of PIL

On 2<sup>nd</sup> february2012 the SC court has taken an unprecedented step and cancelled 122 2G licenses distributed by government in 2008 to different telecom companies.

Often criticised for alleged judicial overreach, the Supreme Court justified its order cancelling 122 licenses for 2G-spectrum, saying it was duty-bound to strike down policies that violate constitutional principles or were contrary to public interest. An apex court bench said this was needed to “ensure that the institutional integrity is not compromised by those in whom the people have reposed trust and who have taken oath to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill will and who, as any other citizen, enjoy fundamental rights but is bound to perform duties” It said, “There cannot be any quarrel with the proposition that the court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies.

“However, when it is clearly demonstrated before the court that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters,” the bench added.

Referring to the PILs filed by the Centre for Public Interest Litigation and Janata Party chief Subramanian Swamy, it said: “When matters like these are brought before the judicial constituent of the State by public spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest...”

While admitting that TRAI was an expert body assigned with important functions under the 1997 TRAI Act, the bench said, the Trai in making recommendations cannot overlook the basic constitutional principles and recommend which should deny majority of people from participating in the distribution of state property.

Holding that spectrum was a natural resources, the court said natural resources “are vested with the government as a matter of trust in the name of the people of India ,and it is the solemn duty of the state to protect the national interest, and natural resources must always be used in interest of the country and not private interest.”

**In Noida land acquisition case** the Supreme Court cancelled the acquisition of land by U.P government as it was acquired for industrial purpose but it was given to builders for making apartments. The court ordered that land should be reverting back to farmers from whom land was acquired.

Often Supreme Court and different high courts pass order for CBI investigation in several cases. Under the law these power lies with the governments. This is again an example of judicial activism.

The Supreme Court has also played a significant role in case relating 2002 Gujarat riot.

### **3.13 FINDINGS**

Recently the country has seen instances of beneficial judicial activism to a great extent. It cannot be disputed that judicial activism has done a lot to ameliorate the conditions of the masses in the country. It has set right a number of wrongs committed by the states (J.N. Pandey, 1998) as well as by individuals. The common people are very often denied the protection of law due to delayed functioning of the courts, also called judicial inertia or judicial tardiness (Nikhil Chakrawartty, 1997). Judicial activism has started the process to remove these occasional aberrations too. This can be furthered only by honest and forthright judicial activism and not by running down the judiciary in the eyes of the public. The greatest asset and the strongest weapon in the armoury of the judiciary is the confidence it commands and the faith it inspires in the minds of the people in its capacity to do even-handed justice and keep the scales in

balance in any dispute. The Chief Justice of India Adarsh Sen Anand (as he then was) has realized that the real source of strength of the judiciary lies in the public confidence in it (A. S. Anand, 1998) and the judges have to ensure that this confidence is not lost. As Justice J.S. Verma (as he then was) has referred: “Judicial activism is a sharp-edged tool which has to be used as a scalpel by a skilful surgeon to cure the malady. Not as a Rampuri knife which can kill.” (J. S. Verma, 1996). The courts have innovated to reach justice to the deprived section of the society. Anything contrary would be like suggesting the abolition of marriage in order to solve the problem of divorce. This socio-economic movement generated by court has at least kept alive the hope of the people for justice and thus has weaned people away from self –help or seeking redress through a private system of justice .It is necessary for sustaining the democratic system and the establishment of a rule of law in society. Therefore, one has to be both adventurous and cautious in this respect and the judiciary has to keep on learning mostly by experience.